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SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

NO. 79-6423

ABBY GAIL LASSITER,
Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

[In the matter of William L. Lassiter]

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Abby Gail Lassiter, petitioner herein, respectfully applies for permission to proceed in forma pauperis in connection with the petition for writ of certiorari to the United States Supreme Court previously filed by petitioner. Petitioner's affidavit in support hereof is annexed hereto.

This the 16th day of April, 1980, Durham, North Carolina.

RESPECTFULLY SUBMITTED:

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM
353 West Main Street
Post Office Box 2101
Durham, North Carolina 27702

(919) 688-6396

By Leowen Evans
Leowen Evans

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v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

[In the matter of William L. Lassiter]

AFFIDAVIT OF ABBY GAIL LASSITER

IN SUPPORT OF

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NORTH CAROLINA]
] ss
COUNTY OF WAKE]

I, ABBY GAIL LASSITER, being first duly sworn according to law, depose and say in support of my application for leave to proceed without prepayment of costs or fees, as follows:

1. I am the petitioner in the above-entitled case;

2. I am 27 years of age;

3. I am presently unemployed;

4. Because of my poverty I am unable to pay the fees and costs of said cause;

5. Similarly, because of my poverty, I am unable to give security for the same, or pay for the cost of printing any briefs;

6. I am presently incarcerated at the North Carolina Correctional Center for Women, Raleigh, North Carolina, and I am without income;

7. In the proceedings below, the Courts permitted me to proceed in forma pauperis;

8. The nature of the cause is fully described in petitioner's petition for writ of certiorari previously filed with this Court;

9. I believe my case is meritorious and this application is not made for the purpose of delay;

10. My attorney, Leowen Evans of the North Central Legal Assistance Program, is serving without payment of any fees.

Abby Gail Lassiter
ABBY GAIL LASSITER

SUBSCRIBED to and sworn to
before me this 10 day of April, 1980.

Jewel W. Seagroves
NOTARY PUBLIC

My Commission Expires: 2-24-85

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79-6423

NO. MISC.

ABBY GAIL LASSITER,

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v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

GREG MALHOIT
Member of the Supreme Court Bar
WAKE-JOHNSTON-HARNETT LEGAL SERVICES
127 West Hargett Street, Room 132
Raleigh, North Carolina 27601

LEOWEN EVANS
NORTH CENTRAL LEGAL ASSISTANCE PROGRAM
Post Office Box 2101
353 West Main Street
Durham, North Carolina 27702

ROBERT L. WALKER
NATIONAL CENTER FOR YOUTH LAW
693 Mission Street
Sixth Floor
San Francisco, California 94105

ATTORNEYS FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. MISC.

ABBY GAIL LASSITER,

Petitioner,

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DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ABBY GAIL LASSITER, petitioner herein, respectfully prays that a writ of certiorari issue to review the decision of the North Carolina Court of Appeals, filed November 6, 1979, affirming the judgment of the District Court of the State of North Carolina, Durham County, permanently terminating petitioner's parental rights. In its opinion the North Carolina Court of Appeals specifically held that there is no federal constitutional right to court-appointed counsel for indigent parents in termination of parental rights proceedings. On January 17, 1980, the Supreme Court of North Carolina denied petitioner's application for discretionary review and dismissed her appeal.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 43 N.C.App. 525, 259 S.E.2d 336 (1979), and is annexed to this petition as Appendix "A", infra. No opinion was written by the Supreme Court of North Carolina. The judgment of the Supreme Court of North Carolina denying petitioner's application for discretionary review and dismissing her appeal is annexed as Appendix "B", infra.

JURISDICTION

Petitioner's application for discretionary review was denied by the Supreme Court of North Carolina on January 17, 1980. No application has been made for an enlargement of time to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment to the United States Constitution requires a state to furnish an indigent parent court-appointed counsel in a proceeding to terminate permanently and irrevocably her parental rights.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1 ***[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

N. C. Gen. Stat. §7A-289.22

The General Assembly declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.
(3) Action which is in the best interest of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict.
(4) This Article shall not be used to circumvent the provisions of Chapter 50A, the Uniform Child Custody Jurisdiction Act. (1977, c. 879, s. 8; 1979, c. 110, s. 6.)

N. C. Gen. Stat. §7A-289.32:

The court may terminate the parental rights upon a finding of one or more of the following:

(1) Repealed by Session Laws 1979, c. 669, s. 2.
(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b) or (c) or a neglected child within the meaning of G.S. 7A-278(4).
(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.
(5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.
(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:
    a. Established paternity judicially or by affidavit; or
    b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
    c. Legitimated the child by marriage to the mother of the child; or
    d. Provided substantial financial support or consistent care with respect to the child and mother.

N. C. Gen. Stat. §7A-300:

§7A-300. Expenses paid from State funds.--(a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly. The Administrative Office of the Courts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:

(1) Salaries, departmental expense, printing and other costs of the appellate division;
(2) Salaries and expenses of superior court judges, solicitors, assistant solicitors, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter;
(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;
(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;
(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;
(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;
(7) Compensation and allowances of court reporters;
(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;
(9) Transcripts of preliminary hearings in indigency cases and, in cases in which the defendant pays for a transcript of the preliminary hearing, a copy for the solicitor;
(10) Transcript of the evidence and trial court charge furnished the solicitor when a criminal action is appealed to the appellate division;
(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State; and
(12) Operating expenses of the Judicial Council and the Judicial Standards Commission.

N. C. Gen. Stat. §7A-450:

§7A-450. Indigency; definition; entitlement; determination--(a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter.
(b) Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.
(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

N. C. Gen. Stat. §7A-451:

§7A-451. Scope of entitlement.--(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;
(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;
(4) A hearing for revocation of probation;
(5) A hearing in which extradition to another state is sought;
(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentall Ill Criminals) of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statutes;
(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;
(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
(13) A proceeding to find a person incompetent under Chapter 35, Article 1A, of the General Statutes.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including if applicable:

(1) An in-custody interrogation;
(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required.
(3) A hearing for the reduction of bail, or to fix bail if b ail has been earlier denied;
(4) A preliminary hearing;
(5) Trial and sentencing; and
(6) Review of any judgment or decree pursuant to G.S.7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

STATEMENT OF FACTS AND PROCEEDING BELOW

On April 10, 1978, the Durham County Department of Social Services filed a petition to terminate the parental rights of Abby Gail Lassiter with respect to her three and one-half year old child, William L. Lassiter. The petition also sought to terminate the parental rights of William Boykin, who was alleged to be the natural father of the child. With respect to Abby Gail Lassiter, petitioner herein, the petition alleged that she had not had any contact with the child since December of 1975; that she was serving a sentence for second degree murder in the Women's State Prison, having been tried and sentenced in July of 1976; and that she had willfully left her child in foster care for more than two consecutive years without showing that substantial progress had been made in correcting the conditions leading to the removal, and without demonstrating a positive response to the efforts of the Social Services Department to strengthen her relationship with her child.

While confined in state prison, petitioner was personally served with a summons and a copy of the petition on April 12, 1978, but she failed to file an answer in response to the petition. On August 11, 1978, petitioner was notified by registered mail that a hearing would be conducted on August 31, 1978.

Petitioner was brought to the hearing on August 31, 1978, but was not represented by counsel. The Durham County Department of Social Services was represented by its counsel, Mr. Thomas R. Odom.

Prior to the taking of testimony, the Court discussed with petitioner her failure to secure representation by counsel. Petitioner stated that although she had informed officials at the North Carolina Correctional Center for Women of the pendency of the proceeding, officials at that institution had taken no action to assist her in finding legal counsel. The

Court ascertained that although petitioner was represented by Thomas F. Loflin III with respect to her criminal conviction, she had not consulted with him concerning the proceeding to terminate her parental rights. At the conclusion of its colloquy with petitioner, the court decided to proceed with the hearing without appointing counsel to represent petitioner. (RT. 3-9).[1]

At the hearing the only witness who testified in support of the petition was Bonnie Cramer, a case worker with the Durham County Department of Social Services. Her sole contact with petitioner had been a visit with her at Women's Prison in December of 1977 or Janaury of 1978. During that visit, petitioner requested that William be placed with her mother, Lucille Lassiter. (RT. 10, 15). Most of her testimony concerning petitioner's treatment of her son, William Lassiter, was based upon social welfare records, none of which were authenticated or qualified as business records exceptions to the hearsay rule. (RT. 10-16).

Petitioner attempted to cross-examine Bonnie Cramer, but because of her unfamiliarity with court procedures, she interspersed her questions with testimonial statements. At the urging of counsel for the Department of Social Services, she was admonished by the court on several occasions to cease testifying, and she, ultimately aborted her cross-examination of the witness. (RT. 19, 21, 24).

---

[1] References denoted "RT" are to petitioner's transcript of the hearing conducted August 31, 1978, and transcribed by an official court reporter for the District Court of Durham County on April 14, 1980. On April 15, 1980, pursuant to Rule 21(1) of the Rules of this Court, petitioner requested that the Clerk of the North Carolina Court of Appeals certify the transcript of the hearing conducted August 31, 1978, and provide for its transmission to this Court.

Petitioner testified in her own behalf and denied that she had failed to secure adequate medical care for the child before she was sentenced to prison. (RT. 27). Most of petitioner's testimony was adduced in response to leading questions from the court who treated petitioner as an adverse witness. (RT. 25-36). Petitioner testified that while she was in prison she hoped that her child would be left with her mother who was caring for her other children. (RT. 40). Petitioner's mother, Lucille Lassiter, testified that she was taking care of petitioner's other children and wished to care for "Little Billy" as well because [petitioner] " . . . is the only one [of my children] that have children and that's personally my family and it's all the family we have and I said I want all her children." (RT. 52). No evidence was adduced as to when petitioner might be eligible to be paroled from prison.

At the conclusion of the hearing the court indicated that it would issue an order terminating petitioner's parental rights. Petitioner stated that she wished to appeal the court's decision, and the court informed her that she could obtain an attorney to represent her on appeal from the North Central Legal Assistance Program. (RT. 62).

On September 7, 1978, the court issued its formal order terminating petitioner's parental rights. Included in the court's order were findings:

> "5. That subsequent to being served with a copy of the Summons and Petition, Abby Gail Lassiter communicated and conferred with her attorney regarding post-conviction proceedings, but did not seek counsel regarding this matter.
>
> 6. That Abby Gail Lassiter has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and her failure to do so is without just cause."

Petitioner filed a timely notice of appeal, and on November 6, 1978, the North Carolina Court of Appeals unanimously affirmed the judgment of the District Court. In the Matter of William L. Lassiter, 43 N.C.App. 525, 259 S.E.2d 336 (1979). (App. A). On January 17, 1980, the Supreme Court of North Carolina denied petitioner's application for discretionary review and dismissed her appeal. (App. B).

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE RAISED BY THIS CASE WAS RECENTLY BEFORE THIS COURT IN IN THE MATTER OF OTIS WHERE, HOWEVER, EVENTS SUBSEQUENT TO THE GRANTING OF CERTIORARI PERSUADED THIS COURT NOT TO REACH THE MERITS.

This case presents a constitutional claim which is almost identical to the issue which was recently before this Court in Subler (In the Matter of Otis, et al., No. 79-5215, cert. granted, 48 L.W. 3290 (10/30/79), vacated and remanded, 2/19/80). In the Matter of Otis, supra, involved an indigent parent's right to court-appointed counsel and a free transcript on appeal in a termination of parental rights proceeding. In the present case petitioner, an indigent parent, is alleging that she was denied her constitutionally guaranteed right to be represented by court-appointed counsel at the trial stage of a termination of parental rights proceeding. In In the Matter of Otis, supra, this Court summarily reversed and remanded the order of the Ohio Court of Appeals for reconsideration in light of a later decision by the Ohio Supreme Court holding that an indigent parent does possess a constitutional right to a free transcript and representation by court-appointed counsel on appeal. See State ex rel. Heller v. Owens, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980). This Court should, therefore, grant a writ of certiorari herein in order to resolve the important federal constitutional question which this case presents and which this Court did not have an opportunity to decide on the merits in In the Matter of Otis, supra.

II.

THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONTRARY TO THE OVERWHELMING WEIGHT OF MODERN AUTHORITY.

Another reason why a writ of certiorari should issue is that a division of authority exists as to the issue presented in the present case with an overwhelming majority of the courts, who

have ruled on the issue, supporting the constitutional right of an indigent parent to representation by counsel in a termination of parental rights proceeding. These include termination of parental rights cases where the right to court-appointed counsel has been held applicable both at the trial level[2] and on appeal.[3] In addition, a large number of state and federal courts have also ruled that indigent parents do possess a constitutionally guaranteed right to counsel in neglect or dependency proceedings.[4] Since the principal difference between a neglect or dependency case and a termination of parental rights case is the length and finality of the deprivation of parental custody, with a termination order being final and irrevocable, the above-cited dependency and neglect cases would a fortiori support an indigent parent's constitutional right to representation by counsel in a termination of parental rights proceeding. In fact, the only modern authorities which petitioner has found holding that an indigent parent is not entitled to be represented by counsel in a dependency, neglect, or termination case have been substantially undermined by later decisions. Compare In re Robinson, 8 Cal.App.3d 783, 87 Cal.Rptr. 678 (1970), cert. den. sub nom. Kaufman v. Carter, 402 U.S. 954 (1971), and In re

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[2]Matter of Chad S., 580 P.2d 983 (Okl. S.Ct. 1978); Crist v. Division of Youth and Family Services, 320 A.2d 203 (Super. Ct. of N.J. 1974); Danforth v. State Dept. of Health & Welfare, 303 A.2d 794, 799 (S.Ct. of Me. 1973); In re Friesz, 208 N.W.2d 259 (Neb. S.Ct. 1973); In re Adoption of R.I., 312 A.2d 601 (Pa. S.Ct. 1973); appeal on other grounds, 361 A.2d 294 (1976), cert. den. 429 U.S. 1032 (1977); State v. Jamison, 444 P.2d 15 (Ore. S.Ct. 1968).

[3]Interest of Brehm, 3 Kan.App.2d 325, 594 P.2d 269 (1979); Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55 (Mich. S.Ct. 1976); In re Welfare of Luscier, 84 Wash. 2d 135, 524 P.2d 906 (Wash. S.Ct. 1974); Chambers v. Dist. Court of Dubuque County, 152 N.W.2d 818 (S.Ct. of Iowa 1967) (dictum).

[4]Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); Davis v. Page, 442 F.Supp. 258 (S.D. Fla. 1977); Smith v. Edmiston, 431 F.Supp. 941 (W.D. Tenn. 1977); In re Welfare of Myricks, 85 Wash. 2d 252, 533 P.2d 841 (Wash. S.Ct. 1975); State ex rel. Lemaster v. Oakley, 204 S.E.2d 140 (W.V. S.Ct. of App. 1974); Crist v. Division of Youth and Family Services, 320 A.2d 203 (N.J. Sup. Ct. 1974), mod. on other grounds, 343 A.2d 815 (1975); In re Ella B., 30 N.Y.2d 353, 285 N.E.2d 288 (N.Y. Ct. of App. 1972).

Joseph T., 25 Cal.App.3d 120, 101 Cal.Rptr. 606 (1972), with In re Simeth, 40 Cal.App.3d 982, 115 Cal.Rptr. 617 (1974) [statutory grounds], and Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); compare also Potvin v. Keller, 313 So.2d 703 (Fla. 1975) with Davis v. Page, 442 F.Supp. 258 (S.D. Fla. 1977).

Further indication of the critical importance of counsel is that numerous model codes, statutes, and rules provide for appointed counsel for indigent parents in dependency, neglect and termination of parental rights proceedings.[5] Finally, the right of indigent parents to appointed counsel at trial in termination of parental rights cases has been established by statute in a large number of jurisdictions, particularly where the applicable codes have been revised in recent years.[6]

It is, therefore, self-evident that the law of North Carolina is at variance with a substantial body of caselaw, statutes, and model codes and rules in refusing to recognize an indigent parent's right to court-appointed counsel in a termina-

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[5] Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, Standard 2.3(b)(IJA-ABA, adopted Feb. 1970); Katz, Freeing Children for Permanent Placement through a Model Act, Section 12(a), 12 Fam.L.Q. 1 (Fall 1978); Lincoln, Model Statute for Termination of Parental Rights, Section 7(2)(NCJFCJ, Nov. 1976); Standard Juvenile Court Act, Sec. 19 (N.C.C.D. 1959); Uniform Juvenile Court Act, Secs. 22(d) and 26(a); Model Rules for Juvenile Courts, Rules 3, 13, and 39 (N.C. C.D., Counsel of Judges, 1969); Legislative Guide for Drafting Family and Juvenile Court Acts, Section 25 (Children's Bureau, H.E.W. 1969); Legislative Guide for the Termination of Parental Rights and Responsibilities and the Adoption of Children, Part II, §8 (H.E.W. Children's Bureau 1968).

[6] See, e.g., Ala. Code §12-15-63; Cal. Civil Code §273.5 (West); Colo. Rev. Stat. §19-11-103(2); D.C. Code Encycl. §16-2304; Ga. Code Ann. §24A-2001; Idaho Code §16-2009; Ind. Code §31-6-7-2(b); Iowa Code Ann. §232.113 (West); Kan. Stat. Ann. §38-820; Ky. Rev. Stat. §199.603; La. Civ. Code Ann. art. 13:1602 (West); Mass. Gen. Laws Ann. ch. 119, §29 (West); Minn. Stat. Ann. §260.155 (West); Mo. Ann. Stat. §211.562 (Vernon); N.H. Rev. Stat. Ann. §170-C:10; N.Y. Fam. Ct. Act §262; N.D. Cent. Code §27-20-26; Ohio Rev. Code Ann. §2151.352; Okla. Stat. Ann. tit. 10, §1109 (West); Or. Rev. Stat. §419.498; S.D. Comp. Laws Ann. §26-9-22.2; Va. Code §49-6-2; Wash. Rev. Code Ann. §13.34.090; W.Va. Code §49-6-2; for a review of all termination statutes as of 1975 see also Katz, Howe, and McGrath, Child Neglect Laws in America, 9 Fam.L.Q. 1, Table X at 47-49 (1975).

tion of parental rights case. It is particularly ironic that, effective January 1, 1980, North Carolina has enacted a statute which would require appointed counsel for indigent parents in abuse, neglect, and dependency cases, but not in termination of parental rights proceedings where the interference with parental rights is total and permanent.[7]

The position of North Carolina not to grant counsel to indigent parents in termination of parental rights cases, as sustained against constitutional challenge by the North Carolina Court of Appeals, is clearly against the weight of modern precedent. Petitioner urges this Court to issue a writ of certiorari in order to resolve this vitally important issue of constitutional law.

III.

AN INDIGENT PARENT IS ENTITLED TO COURT APPOINTED COUNSEL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING.

This Court has required that two steps be met in determining whether a private interest is protected by the procedural due process safeguards of the Fourteenth Amendment. First, the private interest must be shown to be a Fourteenth Amendment liberty or property interest. Smith v. Organization of Foster Families, 431 U.S. 816, 839 (1977). Secondly, where due process must be afforded because an interest is protected by the Fourteenth Amendment, it is necessary to determine "what process is due" in the particular context. Id. at 877.

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[7]In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency, unless the parent waives that right." N.C. Gen. Stat. §7A-587.

Since there is no provision for appointed counsel in those statutes which pertain to termination proceedings [see N.C. Gen. Stats. §7A-239.30-289.34], and since most of the grounds for terminating parental rights do not include findings as to abuse, neglect, or dependency [see N.C. Gen. Stat. §7A-289.32 (3)(4)(5)(6)], it is apparent that the right to counsel accorded parents by N.C. Gen. Stat. §7A-587 does not extend to termination of parental rights proceedings.

A. The Right To Family Integrity Is Among The Most Fundamental Known to Man.

A parent's right to raise, care for, nourish and educate her children are among the most sacred rights known to man. Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley, Id., this Court cited numerous decisions holding that a parent's right to the care and custody of her children is fundamental to our society and entitled to the highest degree of constitutional solicitude. Id. at 651. Recent decisions by this Court reiterate the same theme. See, e.g., Parham v. J. R., 99 S.Ct. 2493 (1979); Caban v. Mohammed, 99 S.Ct. 1760 (1979); Moore v. City of East Cleveland, Ohio, 431 U.S. 495, (1977); Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

Many of the aforementioned cases have involved a single aspect of parental rights. See, e.g., Parham v. J. R., 99 S.Ct. 2493 (1979) [medical decision]; Wisconsin v. Yoder, 406 U.S. 205 (1972) [education and inculcation of morality]. However, in this case the state power impinges upon the entire fabric of parent-child relations since, under North Carolina law, a decision to terminate parental rights permanently and irrevocably severs the relationship between parent and child. N.C. Gen. Stat. §7A-289.32.[8] For this reason the parental rights implicated herein are not only fundamental in a constitutional sense, but, as one court has found, are "...more precious to many people than the right to life itself." In re Gibson, 483 P.2d 131, 135 (Wash. Ct. of App. 1971).

B. The Right To Court Appointed Counsel Is a "Process That Is Due."

To determine the procedural safeguard due a protectible

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[8] In other jurisdictions a court decision terminating parental rights similarly deprives the parent of her right to ever again regain custody of her children. Wald, State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 633 (1976).

liberty interest, this Court has required a balancing of three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Parham v. J. R., 99 S.Ct. at 2502; Matthews v. Elridge, 424 U.S. 319, 335 (1976).

We believe that this balancing test requires that indigent parents be given the right to court appointed counsel in termination proceedings.

1. The Right To Family Integrity Is The Private Interest That Will Be Affected By An Action To Terminate Parental Rights.

The right to family integrity is the private interest affected by the termination of parental rights. Smith, 431 U.S. at 842; Meyer v. Nebraska, 262 U.S. 390 (1923). As stated previously, this right "...is fundamental to our society and entitled to the highest degree of constitutional solitude." Stanley v. Illinois, supra, at 651. Indeed, the family unit may be the most fundamental social institution of our society. Trimble v. Gordon, 430 U.S. 762, 769 (1977).

2. The Risk Of Erroneous Deprivation Of The Right To Family Integrity Is Inherent Within The Procedure Presently Used - Court Appointed Counsel, As An Additional Procedural Safeguard, Will Eliminate The Risk.

We contend that the risk of erroneous deprivation of the right to family integrity is inherent under a procedural scheme that refuses to appoint counsel to an indigent mother in a proceeding to terminate parental rights. We further contend that the failure to appoint counsel did not only present a risk but actually caused erroneous deprivation in this case.

a. The Risk Of Erroneous Deprivation Is Inherent Within The Present Procedure Used.

According to Parham, supra, "[p]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exception." 99 S.Ct. at 2510. An analysis of (1) the nature of the deprivation, (2) the imbalance of resources, (3) the complexity of the factual and legal issues involved, (4) the frequent intermingling of adversarial and judicial roles and (5) the fact that such a proceeding is functionally analagous to a criminal proceeding establishes that erroneous deprivation of indigent parents' right to family integrity is an inherent risk in a proceeding to terminate parental rights.

The permanent nature of the termination proceeding demands that the procedural mechanism used be especially protective--there is no second chance to correct errors. A study of neglect cases in New York indicates the need for appointed counsel when indigent parents are threatened with the removal of their children from the home by the state:

Disposition	% Represented By Counsel	% Unrepresented By Counsel
Children placed outside the home.	18.2	40.6
Discharged under court supervision.	45.4	39.6
Discharged without court supervision.	9.1	5.0
Petition dismissed after findings.	9.1	3.0
Other	18.2	11.8

4 Columbia Journal of Law 230, 242-2 (1968).

> The conclusions to be drawn from these statistics are aptly drawn by the following commentator:
>
> Since there is no evidence indicating that the average respondent who can retain counsel is better or less neglectful than one who cannot, the conclusion seems inescapable that a significant

> number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel....It would be hard to think of a system of law which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings. Note: "Child Neglect: Due Process for the Parent", 70 Columb. L. Rev. 465, 476 (1970). Crist v. Division of Youth and Family Services, 128 N. J. Super. 402, 302 A.2d 203, 208 (1974).

This rationale is equally applicable to termination proceedings since neglect proceedings are often the first step to the permanent removal of the children from their homes. Id.; See N.C. Gen. Stat. §7A-289.32(2).

In addition, the inequitable balance of resources, between indigent parents and the state, contributes to the inherently erroneous risk of deprivation in termination proceedings. Due process of law is a concept which cannot become a reality when an indigent parent, who is unrepresented by counsel, must confront the superior power and resources of the state in a complex proceeding brought to terminate permanently her parental rights. The social services department is represented by an attorney who has assembled a case from welfare, probation, and police records, and who has access to expert assistance from medical, psychological and social work professionals. There is, therefore, a gross and inherent imbalance of resources and expertise between the parties [In re Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 290 (1972] which is exacerbated by the fact that parents who are subjects of these proceedings are frequently ill-equipped to respond in terms of their own intellectual and emotional resources. Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 63-4 (1976); Crist v. Division of Youth, supra. Without the provision of counsel, the parent, unable by poverty and her own unfamiliarity with law to present her case properly, is "...overborne by lawyers and other litigative resources paid for out of the public treasury." Note: The Indigent's Right to Counsel in Civil Cases, 76 Yale L. J. 545, 556 (1967).

Termination of parental rights occurs in the context of a complex legal proceeding in which the guiding hand of counsel is essential if indigent parents are to be furnished a meaningful opportunity to be heard. Presentation of evidence, objecting to evidence, cross-examination of witnesses, finding and utilizing expert testimony, and knowing what evidence is relevant are second-nature to the skilled advocate, but remain beyond the comprehension of most parents in termination proceedings. Davis v. Page, 442 F. Supp. 258, 263 (S.D. Fla. 1977); Danforth v. State Dept. of Health and Welfare, 303 A.2d 794, 799 (Me. S.Ct. 1973); Reist v. Bay County Circuit Judge, 241 N.W.2d 55, 63-64; (Mich. S.Ct. 1976); In re Adoption of R. I., 312 A.2d 601, 602-03 (S.Ct. of Pa. 1973). As one state supreme court has aptly stated in language which is pertinent both to the present case and to the vast majority of termination proceedings:

> "The case at bar was routine for the welfare workers and other juvenile court staff. For the indigent mother, however, the entire proceedings were incomprehensible." State v. Jamison, 444 P.2d 15, 197 (S.Ct. of Ore. 1968).

Finally, as Justice Black recognized, a neglect or termination of parental rights case is functionally analogous to a criminal proceeding.

> ". . .the State is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct--failure to care properly for her children--which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society." Kaufman v. Carter, 402 U.S. 954, 959 (Op. of Black J. diss. from den. of cert.)

The potential for a criminal charge being filed is omnipresent since parental abuse or neglect is, under the laws of every jurisdiction, a basis for criminal prosecution.[10] Therefore, the provision of counsel is essential for the parent to reach an

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[10] For example, N.C. Gen. Stat. §14-318.4 makes child abuse a felony, and N.C. Gen. Stat. §14-316.1 makes it a misdemeanor for a parent to contribute to the neglect of his child.

informed decision as to whether she should testify in the juvenile court proceeding, seek immunity, or attempt to limit her potential for self-incrimination in some other way. See State ex rel. Lemaster v. Oakley, 204 S.E.2d 140, 144 (W. Vir. S.Ct. of App. 1974); Crist v. Division of Youth and Family Services, 320 A.2d 203 (Super. Ct. of N.J. 1974); Danforth v. State Dept. of Health and Welfare, 303 A.2d 794, 799-800 (Me. S.Ct. 1973). The self-incrimination problem is similar to that in Maness v. Myers, 419 U.S. 449, (1975), in which Justice Stewart, in an opinion joined by Justice Blackmun, found that the constitutional right against compulsory self-incrimination encompasses the right to some advice of counsel concerning exercise of the privilege in the first instance. Id. at 471.

Actual Deprivation. Actual termination of parental rights occurred in this case. Many of the difficulties described heretofore, which occur frequently in termination cases when a parent is unrepresented by counsel, are typified in this case. Most of the evidence against petitioner was hearsay based upon social welfare records, but these records were never authenticated or qualified as business records exceptions to the hearsay rule. Petitioner herein was clearly unable to conduct a meaningful cross-examination of Bonnie Cramer, the only witness who testified against her.[11] Since petitioner was unrepresented by counsel,

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[11] In fact, the trial transcript demonstrates that Ms. Lassiter did not understand the function of cross-examination or the difference between testifying herself and examining a witness. For example,

"The Court: All right. Do you want to ask her any questions?
Ms. Lassiter: About what? About what she--
The Court: About this child.
Ms. Lassiter: Oh, yes.
The Court: All right. Go ahead.
[Ms. Lassiter]: The only thing I know is that when you say--
The Court: I don't want you to testify.
Ms. Lassiter: Okay.
The Court: I want to know whether you want to cross-examine her or ask any questions.
Ms. Lassiter: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know--
The Court: I am not talking about what you know. I want to know if you want to ask her any questions or not.
Ms. Lassiter: About that?" (RT. 19).

most of her testimony was delivered in response to questions from the court. The court questioned Ms. Lassiter as though she were an adverse witness and on several occasions, displayed impatience or incredulity at her answers. Most harmful to petitioner was the failure of the court and counsel for the Department of Social Services to elicit information critical to her defense.

The respondent sought termination of petitioner's parental rights on the grounds

> "that [she had] willfully left [her] child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child."

A defense, apparent on the face of the pleadings, is that during the two years in issue (September 1976 to September 1978), petitioner was in prison and, thus, did not willfully leave her son. Furthermore, the additional fact that she asked a member of her extended family to care for her children while she was in jail further negates the allegation that she willfully left her son without making constructive plans for his future.

Petitioner had four other children at the time of the termination proceeding. These four children were placed with petitioner's mother. Petitioner's request that William, the child in issue, also be placed with her mother was denied. Instead, the Durham County Department of Social Services retained the child in foster care, initiated a termination proceeding two years later and terminated her parental rights. This drastic action was taken even though placement with the extended family was the most feasible plan: it would have kept the parent-child relationship intact, it would have allowed the extended family to meet this family crisis, and it would have preserved fiscal resources that were expended for situations where the extended family was not willing to handle the crisis.

A final defense was that the Durham County Department of Social Services had not made diligent efforts to encourage and strengthen the family relationship between petitioner and her child as required by state law. N.C. Gen. Stat. §7A-289.32(3). The refusal to place the child with its extended family is ample support for such a defense. Furthermore, this defense can be supported by a recent survey of North Carolina's foster care institutions:

> "Because of excessively high caseloads, administrative duties, and paperwork, foster care social workers are able to spend only an average of 48 minutes a month on direct, in-person work with each foster child...Once the state has removed the child from his home, it has little contact with the natural parents and [the state] provides few services to help stabilize and reunite the family ..." Governor's Advocacy Council on Children and Youth, Why Can't I Have A Home?: A Report on Foster Care and Adoption in North Carolina, viii (December 1978).

b. The Additional Procedural Safeguard of Court-Appointed Counsel Will Eliminate This Risk.

The preceding argument is premised on the fact that court-appointed counsel in termination proceedings will eliminate the inherent risk of erroneous deprivation of an indigent's right to family integrity.

3. The Government's Parens Patriae And State Police Power Interests Do Not Conflict With Court-Appointed Counsel For Indigent Parents In A Proceeding To Terminate Parental Rights.

We contend that the right to appointed counsel for indigent parents in termination proceedings protects the government's interest, as well as that of the parent. We further contend that even if the government's interest proves to be in conflict with that of the right to appointed counsel, it would not outweigh the need to protect the fundamental interest of the parent.

There are basically two governmental interests involved in the termination of parental rights: parens patriae and the state police power. Stanley v. Illinois, 405 U.S. at 649; Wisconsin v. Yoder, 406 U.S. at 228; Due Process And The Fundamental Right To Family Integrity: A Re-evaluation of South Dakota's Parental Termination Statute, 24 South Dakota Law Review 450 (1979). The state's police power differs from the parens patriae function in that the police power protects society's interest, as well as that of the child. Id.

a. The Government's Parens Patriae Function Is Furthered By Court-Appointed Counsel In A Termination of Parental Rights Proceeding.

Parens Patriae. When the state interferes with a parent's right to family integrity, it generally does so under its parens patriae function as ultimate protector of the child's best interest. Id. North Carolina's parental termination statutes expressly recognize the state's parens patriae duty to "...promote the healthy and orderly physical and emotional well-being of the child." and "...to protect all children from the unnecessary severance of a relationship with biological or legal parents.[12]

A procedure that allows the erroneous termination of parental rights does not further either of these expressed purposes. First, a child's physical or emotional well-being is not promoted when he is erroneously taken away from his family. A recent study has found that "serious emotional problems" exist in thirty percent of the children in North Carolina's foster care system. Why Can't I Have A Home, supra. Another study has found that separation of the child from his parent has caused child neurosis and may lead to dissocial and delinquent behavior later in life. 24 South Dakota Law Review at 454, n. 63. Secondly,

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[12]See N.C. Gen. Stat. §7A-289.22 quoted in full, supra, under "Statutes Involved".

a child is not protected from "unnecessary severence" of his natural parent relationship when his parent's rights are erroneously terminated. Erroneous termination, by definition, is the most serious of all the unnecessary severances of the parent-child relationship.

As stated previously, the appointment of counsel for indigent parents substantially eliminates erroneous termination of parental rights. Such additional procedural safeguard protects parent and child alike: parent, from the erroneous termination of her right to family integrity, and child, from unnecessary severance and emotional trauma. Therefore, the additional procedural safeguard of appointed counsel in termination cases furthers the state's parens patriae function.

b. The Government's State Power Function, Including Fiscal and Administrative Cost, Is Also Furthered By Court-Appointed Counsel In A Termination of Parental Right Proceeding.

In termination proceedings, the state's police power interest is to promote the health, safety and general welfare of its citizens as a whole, while protecting the best interest of the child. 24 South Dakota Law Review at 450. Society's interest includes the fiscal and administrative burden it must bear for such proceedings. Parham v. J. R., supra; Matthews v. Elridge, supra. There are several reasons why the court appointed counsel will not conflict with the state's police power function in such proceedings: (1) North Carolina already has a mechanism to appoint counsel for indigent juvenile deliquents, and for indigent parents in abuse, neglect and dependency actions, (2) this appointment of counsel mechanism may pay for itself in termination cases, and (3) even if it does not, fiscal cost alone does not outweigh the need to protect the fundamental interest involved.

A constitutional mandate to appoint counsel in termination of parental rights cases will not result in substantial "start-up" costs. North Carolina, like most states, already

provides court-appointed counsel to juveniles in delinquency, abuse and neglect cases, and to indigent parents in abuse, neglect or dependent cases.[13]

The appointment of counsel for indigent parents in termination cases may not result in an increased economic burden to the state--the amount saved by the prevention of erroneous placement of children in foster care may pay for the appointment of counsel in such cases. One child erroneously placed in foster care will cost the public approximately thirteen thousand, two hundred dollars ($13,200.00) over a period of four years (the average stay of children placed in foster care in North Carolina). This money saved can be used to pay the expenses for granting indigent parents the right to court-appointed counsel.[14]

Finally, even if we were to assume that there will be some increase in cost, fiscal and administrative cost alone does not outweigh the need to provide procedural safeguards in constitutional adjudications. Matthews v. Elridge, 424 U.S. at 348; Stanley v. Illinois, 405 U.S. at 656. The constitution recognizes higher values than speed and efficiency. Stanley, 405 U.S. at 656.

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[13] "In any proceeding in which delinquency is alleged, the judge shall appoint counsel unless counsel is retained for the juvenile." N.C. Gen. Stat. §7A-584.

"When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile." N.C. Gen. Stat. §7A-586.

"In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to appointed counsel in cases of indigency unless the parent waives the right." N.C. Gen. Stat. §7A-587.

See, fn 5-6, supra, for the list of the jurisdictions that have granted the right to court-appointed counsel in neglect, abuse, dependency and termination proceedings.

[14] A child remains in foster care an average of four (4) years in North Carolina. Why Can't I Have A Home, at vii. Average monthly cost for that child is Two Hundred Seventy-five Dollars ($275.00). Id., at 63. Yearly cost is Three Thousand Three Hundred Dollars ($3,300.00)--[12 x $275.00 = $3,300.00]. Total cost for his stay in foster care is Thirteen Thousand Two Hundred Dollars ($13,200.00)--[4 x $3,300.00 = $13,200.00].

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

This the 15th day of April, 1980.

RESPECTFULLY SUBMITTED:

GREG MALHOIT
Member of the Supreme Court Bar
WAKE-JOHNSTON-HARNETT LEGAL SERVICES
127 West Hargett Street
Room 132
Raleigh, North Carolina 27601

(919) 828-4647

ROBERT I. WALKER
NATIONAL CENTER FOR YOUTH LAW
693 Mission Street
Sixth Floor
San Francisco, California 94105

(415) 543-3307

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM
Post Office Box 2101
353 West Main Street
Durham, North Carolina 27702

(919) 688-6396

By Leowen Evans
LEOWEN EVANS

ATTORNEYS FOR PETITIONER